Subterranean Natural Mineral Water Sdn Bhd v Kho Boon Kwang

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–42 OF 2000–III(II)
ZAKARIA SAM JC
26 MARCH 2002

Companies and Corporations *— Liquidation — Appointment of advocate to defend action — No authorization from court or committee of investigation — Whether appointment valid — Companies Act 1965 s 236(1), (e) & (2)(a)*

The second defendant ('the appellant'), a company in liquidation, filed an application to set aside a judgment in default entered by the plaintiff ('the respondent'). Consent was given by the Official Receiver to M/s Battenberg & Talma through a letter to defend this action on behalf of the second defendant. At the hearing of the application, the respondent raised a preliminary objection that M/s Battenberg & Talma had no locus standi in respect of the second defendant's notice of application. The learned sessions court judge, in upholding the plaintiff's objection, dismissed the second defendant's application and against the order, the latter filed this notice of appeal. The issue was whether the appointment of M/s Battenberg & Talma by the Official Receiver to defend the second defendant, without the authorization of the court or the committee of inspection as stipulated under s 236(1) of the Companies Act 1965 ('the Act') was a valid appointment.

Held, allowing the appeal with costs:

Section 236(1)(e) of the Act provided that the liquidator may appoint an advocate to assist him in running the business of a company in liquidation, ie to assist in the day to day management of the company. The appointment of an advocate to defend the company in court, however, did not amount to assisting the liquidator in the running or managing the company (see p 442F–H). However, s 236(2)(a) of the Act allowed a liquidator to bring or defend an action on behalf of a company. In such cases, a company must be represented by a counsel to either commence or defend an action. Therefore, the power to commence an action must necessarily include the power to appoint an advocate for this purpose (see p 442H–I); *Selvam Holdings (M) Sdn Bhd v Toby Lam & Anor* [1994] MLJU 429 and *Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd & Anor* [1999] 4 MLJ 262 followed; *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor* [1993] 1 MLJ 119 not followed; *Kosmopolitan Credit & Leasing Sdn Bhd v Yeo Heng Heang & Ors* [1996] 6 MLJ 725 distinguished. The plaintiff's objection was therefore without merit.

[Bahasa Malaysia summary

Defendan kedua ('perayu'), sebuah syarikat dalam penyelesaian, memfailkan satu permohonan untuk mengetepikan satu penghakiman ingkar yang dimasuki oleh plaintif ('responden'). Persetujuan telah diberikan oleh Pegawai Penerima kepada Tetuan Battenberg & Talma melalui sepucuk surat untuk membela tindakan ini bagi pihak defendan kedua. Semasa perbicaraan permohonan ini, responden telah menimbulkan satu bantahan awal bahawa Tetuan Battenberg & Talma tidak mempunyai locus standi berhubung notis permohonan defendan kedua. Hakim mahkamah sesyen yang arif, dalam mengekalkan bantahan plaintif, telah menolak permohonan defendan kedua dan terhadap perintah tersebut, defendan kedua telah memfailkan notis rayuan ini. Persoalannya adalah sama ada perlantikan Tetuan Battenberg & Talma oleh Pegawai Penerima untuk membela defendan kedua, tanpa pemberian kuasa oleh mahkamah atau jawatankuasa siasatan sebagai mana yang dinyatakan di bawah s 236(1) Akta Syarikat 1965 ('Akta tersebut') adalah satu perlantikan yang sah.

Diputuskan, membenarkan rayuan tersebut dengan kos:

Seksyen 236(1) Akta tersebut memperuntukkan bahawa penyelesai boleh melantik seorang peguambela untuk membantu beliau dalam pelaksanaan perniagaan syarikat dalam penyelesaian, iaitu untuk membantu urusan harian syarikat tersebut. Perlantikan seorang peguambela untuk membela syarikat di mahkamah, bagaimanapun, tidak dikira sebagai membantu penyelesai dalam pengendalian atau pengurusan syarikat tersebut (lihat ms 442F–H). Namun begitu, s 236(2)(a) Akta tersebut membenarkan seorang penyelesai untuk memulakan atau membela satu tindakan bagi pihak sebuah syarikat. Dalam kes sebegini, sebuah syarikat mestilah diwakili oleh seorang peguam untuk sama ada memulakan atau membela satu tindakan. Oleh itu, kuasa untuk memulakan satu tindakan mestilah perlu disertai dengan kuasa untuk melantik seorang peguambela bagi tujuan tersebut (lihat ms 442H–I); *Selvam Holdings (M) Sdn Bhd v Toby Lam & Anor* [1994] MLJU 429 dan *Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd & Anor* [1999] 4 MLJ 262 diikut; *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor* [1993] 1 MLJ 119 tidak diikut; *Kosmopolitan Credit & Leasing Sdn Bhd v Yeo Heng Heang & Ors* [1996] 6 MLJ 725 dibeza. Bantahan plaintif oleh demikian adalah tanpa merit.]

Notes

For cases on liquidation generally, see 3(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 310–311.

Cases referred to

Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor [1993] 1 MLJ 119 (not folld)

Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd & Anor [1999] 4 MLJ 262 (folld)

Kosmopolitan Credit & Leasing Sdn Bhd v Yeo Heng Heang & Ors [1996] 6 MLJ 725 (distd)

Selvam Holdings (M) Sdn Bhd v Toby Lam & Anor [1994] MLJU 429 (folld)

Legislation referred to

Companies Act 1965 s 236(1)(e), (2)(a), (i)

Appeal from: Summons No 52–335 of 1996(1) (Sessions Court, Kuching)

Maris Agan (*Battenberg & Talma*) for the appellant.
Baxter Michael (*Ee & Lim*) for the respondent.

Zakaria Sam JC:

Background

On 14 June 1997, judgment in default was entered by the plaintiff against the second defendant ('the appellant') for the sum of RM130,000, of which RM100,000 being money paid to the second defendant as a deposit for a proposed joint venture which did not materialize, and the sum of RM30,000 being the expenses incurred by the plaintiff for the benefit and on behalf of the second defendant.

The second defendant, then, on 29 June 2000, filed an application to set aside the said judgment in default on the grounds that:

(a) the said judgment in default of appearance is irregular as a winding up order had been made against the second defendant on 6 December 1996 and the Official Assignee Malaysia was appointed as the official receiver of the company; and

(b) the plaintiff did not obtain the leave of court under s 226(3) of the Companies Act 1965 ('the Act'), to proceed or continue the action against the second defendant.

However, for the purpose of this application, consent has been given by the Official Receiver to M/s Battenberg & Talma through a letter dated 25 June 1999 to defend this action on behalf of the second defendant.

At the hearing of the said application on 9 November 2000, the plaintiff ('the respondent') raised the following preliminary objections:

(a) that M/s Battenberg & Talma has no locus standi in respect of the second defendant's said notice of application;

(b) that Mr Stanley Eddy has no authority to make the affidavit on behalf of the second defendant. A

The learned sessions court judge, in upholding the plaintiff's objection, dismissed the second defendant's application on 9 November 2000. Against the said order, the second defendant filed this notice of appeal.

The only issue in this appeal is whether the appointment of M/s Battenberg & Talma by the official receiver to defend the second defendant, without the authorization of the court or the committee of inspection as stipulated under s 236(1) of the Act was a valid appointment. B

The learned counsel for the plaintiff submitted that M/s Battenberg & Talma were appointed without the proper authority of the court or the committee of inspection. Therefore, the said appointment was in breach of s 236(1)(e) of the Act which provides that: C

> The liquidator may with the authority either of the court or of the committee of inspection appoint an advocate to assist him in his duties.

It was further explained that s 236(2)(a) must be taken to mean that the decision to institute or defend any suit is the discretion of the liquidator. The liquidator cannot unilaterally delegate this discretion. However, if the liquidator proposed to delegate or appoint an advocate to assist him, he must obtain the sanction of the court or the committee of inspection under s 236(1)(e). D

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The learned counsel for the second defendant in his submission urged this court to refer to s 236(2)(a) of the Act which read:

> The liquidator may bring or defend any action or other legal proceedings in the name and on behalf of the company.

and proceeded to submit that the power of the liquidator under s 236(2)(a) of the Act to bring or defend an action on behalf of a company in liquidation must necessarily include the power to appoint an advocate for that purpose. F

In my opinion, s 236(1)(e) talks about the liquidator appointing an advocate to assist him running the business of a company in liquidation. Assisting a liquidator in his duties here, to my mind, is to assist the liquidator in running the day to day management of the company. Appointing an advocate to defend an action or other legal proceedings in the name and on behalf of the company as enunciated under s 236(2)(a) does not fall under the category of assisting a liquidator in his duties. The appointment of an advocate to defend the company in court is not considered as assisting the liquidator in the running or managing the company. A liquidator by himself cannot bring or defend any action or other legal proceedings in the name and on behalf of the company. He needs the services of a counsel for that purpose. A company must be represented by a counsel to either commence or defend an action. My stand here is fortified further by the decision of Abdul Aziz J in *Selvam Holdings (M) Sdn Bhd v Toby Lam & Anor* [1994] MLJU 429 where the learned judge held that the power to commence an action as well, must necessarily include the power to appoint an advocate for the purpose. This decision was G H I

also adopted by Ian Chin J in *Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd & Anor* [1999] 4 MLJ 262.

Therefore, I most respectfully disagree with the decision in *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor* [1993] 1 MLJ 119 where it was held that in the absence of the authority granted by the court or by the committee of inspection, the counsel for the liquidator has no locus standi.

As for the case of *Kosmopolitan Credit & Leasing Sdn Bhd v Yeo Heng Heang & Ors* [1996] 6 MLJ 725 which was cited by the learned counsel for the plaintiff, the facts of which are distinguishable. In that case, the plaintiff company under liquidation sued the defendants on a loan. The action was commenced via Ler Cheng Chye and Lim Tuck Cheong (the receivers and managers of the company before liquidation) who claimed to have derived the authority to initiate the proceedings from the liquidator. It was held by KC Vohrah J (as he then was) that both the former receivers and managers ceased to be receivers and managers of the company once the order of winding up was made in respect of the company. The liquidator did not have the power to appoint receivers and managers to initiate the proceedings. The power of instituting any suit is the discretion of the liquidator, and this discretion could not be delegated to an agent was clearly specified under s 236(2)(i) of the Act.

Conclusion

Based on the above reasons, I find that the preliminary objections of the plaintiff are devoid of merit. The appeal by the second defendant is hereby allowed with costs.

Appeal allowed with costs.

Reported by Ezatul Zuria Azhari